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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)
	)
Inter-Carrier Compensation for ISP-Bound Traffic	) CC Docket No. 99-68
	)

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APR 27 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF TIME WARNER TELECOM

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TABLE OF CONTENTS

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	)	
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	)	

REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby files these reply comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

INTRODUCTION

As TWTC and others demonstrated in comments filed in this proceeding, it is fairly simple to design rules that ensure the efficient recovery by one LEC from another LEC of the costs of delivering traffic to ISPs. That is, delivery of ISP-bound traffic over circuit-switched voice connections must be treated in the same manner as those technically identical functions are treated on calls to other end users. The carrier performing these functions should bill the originating carrier a rate based on forward-looking cost. Moreover, all of the reasons why the symmetrical rates based on forward-looking costs are appropriate for Section 251(b)(5) traffic apply fully in this context as

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1 See Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Notice of Proposed Rulemaking* (rel. Feb. 26, 1999).

well. The Commission should therefore require that the exchange of ISP-bound traffic be included in Section 251-252 interconnection agreements and that they be subject to the rules applicable to Section 251(b)(5) traffic.

The ILECs argue that there is no legal basis for including the inter-carrier exchange of ISP-bound traffic in Section 251-252 negotiated and arbitrated agreements. As explained in detail in the reply comments filed by ALTS in this proceeding, these arguments are simply wrong. Most fundamentally, the Eighth Circuit recently held that the Commission may share with the states the regulation of the rates paid by ISPs for receiving jurisdictionally mixed data traffic. This decision means that the Commission may also share in the regulation of inter-carrier rates for the exchange of ISP-bound traffic with the states by establishing federal guidelines to be implemented in the Section 252 arbitration and review process. In any event, the FCC could avoid the issue entirely by mandating under Sections 201 and 202(a) that ILECs apply to ISP-bound traffic whatever rates and other terms and conditions apply to the exchange of Section 251(b)(5) traffic.

Nor should the Commission accept the ILECs' absurd request that rules for the exchange of ISP-bound traffic be designed to compensate ILECs for revenue shortfalls purportedly caused by flaws in local rates. This is simply an artless attempt to hide old and sour wine in new bottles. The ILECs have long claimed, without convincing factual support, that ISP-bound traffic causes them to incur costs they cannot recover through local rates. But so long as current reciprocal compensation rates are based on forward-looking costs, an issue that must be resolved regardless of the rules adopted in this proceeding, the ILECs' purported revenue shortfall ought to be the same *regardless* of whether they incur transport and termination costs themselves or pay CLECs for incurring those costs. Thus, whether a revenue shortfall actually exists and what to do about it ought to be irrelevant to this proceeding. Rather, the revenue shortfall arguments must be made before the states, which have jurisdiction over local rates and are in any case better placed to determine whether ILECs can recover the costs of carrying ISP-bound traffic.

Furthermore, it is nonsensical to design rules for inter-carrier compensation for ISP-bound traffic in order to compensate for the purported data traffic revenue shortfall. As a preliminary matter, a great deal of Internet traffic remains entirely on the ILECs' network (i.e., where the ISP is served by the ILEC), and changes in inter-carrier compensation rules would not address shortfalls caused by this traffic. Further, CLECs cannot serve ISPs if they cannot recover the costs of terminating traffic to them. The ILEC proposals for inter-carrier compensation would thus force ISPs back on the ILECs' networks. But of course the revenue shortfall (again, assuming there is one) would still exist because it is local rates that cause the problem.

In any event, the ILECs' bailout proposals, while couched in the rhetoric of efficiency, would undermine the policy goals of this proceeding by introducing new inefficiencies and, as mentioned, eliminating competitive alternatives for ISPs. The ILECs claim that either no inter-carrier compensation (essentially bill and keep) should be due for the exchange of ISP-bound traffic or, incredibly, that LECs serving ISPs should pay LECs originating ISP-bound calls for the exchange of this traffic. Both of these approaches require that a LEC serving an ISP recover the costs of delivering ISP-bound traffic from the called party. But local rates are designed, and properly so, to cover the cost of carrying (originating, transporting and terminating) the calls originated by subscribers. The ILECs are therefore asking that they be permitted to recover these costs in local rates and pocket any savings (as well as a portion of the ISP's service charge) where another LEC must incur the costs of transport and termination. Moreover, since ILECs have steeply discounted their business line rates for ISPs, CLECs could not compete for ISP customers at all if required to recover transport and termination costs from their ISP customers, let alone afford to pay the ILEC a portion of the ISP's service charge.

The ILECs also make little or no attempt to document their claims that mandated inter-carrier compensation for ISP-bound traffic results in inefficient CLEC behavior (such as not marketing service to ISP customers, sharing reciprocal compensation revenues with ISPs and investing in inefficient circuit-switched networks). The ILECs overstate the extent to which CLECs actually engage in this type of behavior. More fundamentally, to the extent it exists, such behavior is not caused by mandated inter-carrier compensation but rather by flaws in the *rate* for inter-carrier compensation and in flaws in the state local rate regimes, problems that must be addressed independent of this proceeding.

Finally, Ameritech's argument that Section 252(i) MFN rights cannot be applied to the exchange of ISP-bound traffic is easily rejected. Section 252(i) can and must be construed to grant requesting telecommunications carriers pick and choose rights to all of the provisions of an interconnection agreement.

I. IT IS FULLY CONSISTENT WITH THE PROVISIONS OF SECTIONS 251 AND 252 TO INCLUDE THE EXCHANGE OF ISP-BOUND TRAFFIC IN INTERCONNECTION NEGOTIATIONS AND ARBITRATIONS.

The ILECs argue strenuously that Sections 251-252 do not allow the FCC to delegate to the states the responsibility of regulating inter-carrier compensation of largely interstate ISP-bound traffic in the Section 252 arbitration and approval process. Alternatively, several ILECs argue that, in any event, the states themselves lack the authority to regulate inter-carrier payments for ISP-bound traffic. As demonstrated in the reply comments submitted by ALTS in this proceeding, these arguments are meritless. While TWTC provides a brief summary of the flaws in the ILEC position, it incorporates by reference and fully supports the more detailed discussion of this issue provided in the ALTS replies.

First, it is fully permissible for the Commission to require that states oversee the exchange of ISP-bound traffic in the Section 252 process subject to federal guidelines. In recently affirming the FCC's policy of allowing ISPs to purchase connections to the network via state tariffed local business lines, the Eighth Circuit held that the FCC may allow state regulators to set rates for the recovery of interstate costs related to ISP-bound traffic. See Southwestern Bell Tel. v. FCC, 153 F.3d 523, 541-544 (8th Cir. 1998). The logic of this decision applies equally to inter-carrier rates. Furthermore, Section 252(b) grants the states the authority to arbitrate "any open issues," a phrase whose broad reach allows state arbitrators to resolve controversies related to contract provisions governing aspects of interconnection agreements that are not specifically covered by Section 251. See 47 U.S.C. § 252(b)(5).[2]

Second, there is no question that states have the authority to regulate a jurisdictionally mixed service where the interstate and intrastate components are inseverable and where neither Congress nor the FCC has preempted state regulation. Again, as explained in greater detail in the ALTS reply comments, the

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2 As explained in the ALTS reply comments, the Commission may (although it should not) delegate intercarrier compensation for ISP-bound traffic to the Section 252 process without federal guidance. This is because Sections 251(d)(3) and 261(c) grant the states the authority to apply state law in the Section 252 arbitration and review process to regulate jurisdictionally mixed ISP-bound traffic in the absence of conflicting federal law.

states have long been permitted to regulate in such cases. For example, the states were permitted to regulate mixed use telecommunications terminal equipment prior to the establishment of federal regulations governing that equipment. See North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1050 (4th Cir. 1977). Current federal law also delegates to the states the authority to regulate certain mixed use special access lines. See MTS and WATS Market Structure, Decision and Order, 4 FCC Rcd 5660 (1989).

Finally, even if the Commission were to decide that it did not want to delegate to the states the responsibility of overseeing inter-carrier exchange of ISP-bound traffic, the Commission could, pursuant to Sections 201 and 202(a), require that ILECs treat ISP-bound traffic exactly as they do Section 251(b)(5) traffic. As TWTC demonstrated in its comments, it would be impermissibly discriminatory for ILECs to treat the transport and termination of ISP-bound traffic and Section 251(b)(5) traffic differently. Whatever federal and state rules that govern Section 251(b)(5) traffic should, as a matter of federal law, apply to ISP-bound traffic. Such an approach obviates the need to even consider the role of the Section 252 arbitration and review process.

II. THE COMMISSION SHOULD REJECT ILEC PROPOSALS TO ELIMINATE INTER-CARRIER COMPENSATION FOR ISP-BOUND TRAFFIC OR TO REQUIRE LECS SERVING ISPS TO PAY LECS SERVING ISP CUSTOMERS.

In a crude attempt to game regulatory outcomes without regard to the consequences for public policy, the BOCs and GTE argue variously that no payment should be due to LECs transporting and delivering ISP-bound traffic or that the LEC serving the ISP should pay the originating LEC. These proposals are all rooted in the ILECs' claim that they cannot recover the costs of carrying ISP-bound traffic from local service charges paid by ISP subscribers. This claim is dubious, irrelevant to this proceeding and in any case can only be properly addressed by the states. Moreover, the proposals the ILECs make to fix their purported revenue shortfall would, if implemented, introduce obvious regulatory distortions and would result in the elimination competitive alternatives for ISPs.

First, the Commission need not even concern itself in this proceeding with the shortfall ILECs claim to experience as a result of carrying ISP-bound traffic. If inter-carrier compensation is based on a reasonable estimation of the costs of transporting and delivering circuit switched traffic to end users, an ILEC will incur the same costs regardless of whether it delivers ISP-bound traffic itself or pays another LEC to perform the function.[3] Thus, whatever shortfall the ILECs may experience as a result of carrying ISP-bound traffic is not caused by the

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[3] It is therefore irrelevant that ISP "traffic flow is in so sense 'reciprocal,' and inter-carrier payments would go entirely one-way -- from the originating carrier to the carrier that interconnects with the ISP." Bell Atlantic Comments at 3. Where the traffic is so imbalanced, the only way to prevent CLECs from bearing the ILECs' avoided transport and delivery costs is to mandate intercarrier compensation.

obligation to pay inter-carrier compensation for the exchange of this traffic. Rather, it would be caused by a flaw in local rates.

Moreover, to design its inter-carrier compensation rules for ISP-bound traffic to fix some imperfection in local rates would require that the FCC expend vast resources to determine, as an initial matter, whether a shortfall exists. Of course, the Commission only recently concluded that it was "not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs."[4] In any event, more detailed examination of the issue would entail endless studies on the costs incurred by each ILEC when carrying ISP-bound traffic. In addition, while the ILECs attempt to oversimplify the issue by complaining that the typical ISP subscriber's local service charges do not cover the costs that subscriber imposes on the network, the issue is much more complicated. Most importantly, local rates are averaged across a particular region and class of user. Thus, in determining whether a revenue shortfall exists, the Commission would be forced to perform studies on aggregate revenues associated with a particular class of customer in a particular area for each ILEC.[5] The cost and time associated

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4 See Access Charge Reform, *First Report and Order*, 12 FCC Rcd 15982, ¶ 346 (1997) ("Access Charge Order").

5 Ameritech submitted a study that purports to demonstrate that "a [LEC] does not receive revenues sufficient to cover its costs when it provides local exchange service to end users who use the service for Internet access." Ameritech Comments, Attachment A at 1. Since the Ameritech study did

with designing, conducting and reviewing such studies is daunting.

Even if the FCC were able to determine if and to what extent each ILEC experiences a shortfall associated with carrying ISP-bound traffic, inter-carrier compensation rules could not eliminate the problem. To begin with, inter-carrier compensation has no effect at all on the substantial amount of ISP-bound traffic that ILECs originate and terminate on their own networks. Any shortfall due to this traffic would have to be addressed through a separate mechanism. Furthermore, as explained below, if the Commission were to adopt the ILECs' proposals to eliminate inter-carrier compensation for ISP-bound traffic (let alone proposals for the CLEC to pay ILECs), CLECs could not serve ISPs. The ISPs would then be forced back on the ILEC networks and the revenue shortfall would remain as large as it was originally. All of this simply goes to show that reform of local rates is the only rational way to address any revenue shortfall that may be caused by ISP-bound traffic. The Commission reached just this conclusion when it held in the Accesss Charge Reform docket that ILECs claiming that ISP-bound traffic resulted in a revenue shortfall "may address their concerns with state regulators." See Access Charge Order, ¶ 346.[6]

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not even consider all of the other end users with whom the ISP subscribers' local rates are averaged, the study is completely uninstructive.

6 Ameritech seems to think that that the Commission "suggested" in the Access Charge Order that ILECs can only

Not only would the elimination of inter-carrier compensation fail to solve the ILECs' problem (again, assuming there is one), it would eliminate local competition for ISPs. CLECs have no choice but to follow the ILEC local rate structure, and local rates are designed to recover the cost of carrying a subscriber's originating traffic. If CLECs attempted to raise ISP rates to recover the cost of terminating ILEC traffic to ISPs, the CLECs' prices would be much higher than the ILECs' business line rates. This is especially so since the ILECs have apparently begun to steeply discount ISDN PRI lines and other business services used by ISPs in order to win those customers back.[7] In sum, eliminating inter-carrier compensation for ISP traffic would not allow CLECs to compete for ISPs. While this is exactly the result the ILECs seek, it would fly in the face of the Commission's policy goals of "ensuring the broadest possible

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recover the costs associated with carrying ISP-bound traffic from ISPs and that the same must be true for CLECs. See Ameritech Comments at 11-12, n.15. But the Commission made no such decision. Rather, it made the much broader observation that the states should address the recovery of the costs of ISP-bound traffic in the first instance in whatever manner is appropriate.

7 For example, TWTC recently filed a complaint, attached hereto as an exhibit, with the Indiana Utility Regulatory Commission alleging that, in an effort to win back ISP customers, Ameritech is offering rebates or credits, waiving nonrecurring and installation charges and generally pricing ISDN service below cost in violation of state and federal law. See Verified Request For Emergency Suspension Of Ameritech's CSO Authority, Request To Open An Investigation Into Ameritech's CSO Practices And To Issue An Order Requiring Ameritech To Show Cause, filed in Ind. Util. Reg. Com. Cause No. 40849.

entry of efficient new competitors" and "providing to consumers as rapidly as possible the benefits of competition and emerging technologies." NPRM, ¶ 33.

Some of the ILECs do not even stop at seeking the elimination of inter-carrier compensation but ask that LECs serving ISPs be required to *pay* LECs serving ISP subscribers. See, e.g., U S West Comments at 3-8; SBC Comments at 7-9, 22-23; BellSouth Comments at 7-9. These ILECs argue that ISPs purchase a form of access from LECs at local business rates and that, where two LECs provide access service, they must share the charges paid by the access purchaser, in this case the ISP.[8]

But while the Commission has characterized the type of service purchased by ISPs from LECs as "interstate" and "access," those labels do not determine the model for inter-carrier compensation. Rather, the issue turns on whether the costs of connections to ISPs are supposed to be covered by the local

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8 While the elimination of mandatory inter-carrier payments makes competition for ISP customers highly unlikely, such competition is unthinkable under the ILECs' revenue sharing proposals. For example, U S West suggests that carriers allocate the ISP's local service charge between each other based on "the number of access lines each carrier sells to non-ISP end users in a given area." U S West Comments at 11. A typical ISDN PRI rate for ISPs is about $500 (sometimes higher, sometimes lower). Even a highly successful CLEC serves no more than 5% of the access lines in a narrowly defined "area." Under these facts, U S West's risible proposal would permit the CLEC to recover $25 for ISDN PRI service. Not even an ILEC intent on cross-subsidizing this service could come close to reducing the costs of ISDN PRI to $25 or anything close to that amount.

service charges paid by ISP subscribers. Since they unquestionably are, meet point billing does not apply.

Local rates paid by ISP subscribers are set at a level to ensure recovery of all subscriber-originated calls to seven digit dialed numbers located in the same calling area. This includes calls to ISPs. It is for this reason that the costs associated with ISP-bound dial-up calls are assigned to the intrastate jurisdiction for separations purposes.[9] In this situation, it makes sense for the originating LEC to pay the delivering LEC because the originating LEC has already received payment for delivering the call. The delivering LEC is unable, as a practical matter, to recover the costs of transport and delivery from its subscriber because doing so would result in that LEC charging rates above competitive levels.

In contrast, the costs incurred by an ILEC to deliver traffic to the purchaser of federally tariffed access service (such as Feature Group A) are not allocated to the intrastate jurisdiction and are not covered by the local service charge. Where another LEC provides the federally tariffed access service, the access purchaser pays that LEC for the cost of carrying the traffic. It therefore makes sense that the LEC with the customer

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9 SBC's recent decision to assign these costs to the interstate jurisdiction is a transparent attempt to unilaterally change the regulatory scheme applicable to ISPs. The Commission should not tolerate this subversion of its policy of classifying ISPs as end users and should order SBC to allocate the costs of ISP-bound traffic to the intrastate jurisdiction.

relationship with the purchaser of the federally tariffed access service should split its access revenues with the LEC serving the access purchaser's customer. As this description demonstrates, however, the fact that such meet point arrangements are used for Feature Group A in no way means that they should apply for the exchange of ISP-bound traffic. Indeed, the FCC has been careful to exclude ISP-bound traffic entirely from its access regime.

Similarly, it is untrue, although U S West and BellSouth imply otherwise, that the Commission's characterization of the connection purchased by ISPs via local service as "interstate access" somehow compels the application of meet-point billing arrangements. The Commission characterizes local calls to leaky PBXs that route calls to interstate network as interstate access services.[10] Yet leaky PBX owners are classified as end users and it has never been asserted that meet point billing arrangements apply where two carriers share in the provision of such "access" services.

Furthermore, if taken to its logical extreme, the ILECs' argument would require meet point billing any time an end user receives a local call and routes the call to an interexchange network. The exchange of traffic destined for credit verification networks, ticket purchasing agencies, and bank-by-

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10 See MTS and WATS Market Structure, *Memorandum Opinion and Order*, 97 FCC Rcd 682, ¶ 78 (1983) ("[a]mong the variety of users of access service are . . . private line and WATS customer, large and small, who 'leak' traffic into the exchanges").

phone lines, just to name a few, would all have to be subject to meet point billing.

Nor is it significant, as SBC seems to think, that "ISPs sell retail Internet service to customers just as IXCs sell retail long distance to their customers, and both collect a separate charge from their customers." SBC Comments at 7. Most end users that receive local calls and route them to interexchange networks also charge separate fees to their customers. Regardless of whether such a charge is built into the flat fee a customer pays for all services provided by the entity (as may be true of a bank) or the charge is usage-based, the principle is the same. Thus, levying a separate charge on a customer for a service that includes routing to an interexchange network does not somehow result in the application of access charges or for that matter meet point billing.

Furthermore, the Commission should give no weight to unsupported and irresponsible claims that the inter-carrier compensation for ISP-traffic actually harms competition. None of these purported harmful effects could actually be caused by mandated inter-carrier compensation for ISP-bound traffic.

For example, SBC conjectures, without supporting evidence, that "even a very low per minute rate" for inter-carrier compensation on ISP-bound traffic eliminates CLECs' incentive to offer local service to those that also purchase Internet access (apparently because the CLECs would lose inter-carrier compensation when serving ISP customers). SBC Comments at 20-21.

This claim blithely overlooks the conventional CLEC strategy of offering bundled local voice and Internet access service.[11] That such offerings have not been extended to residential customers in many cases is simply a function of the higher margins associated with serving business customers. Moreover, LECs would only design their market strategy in order to maximize their reciprocal compensation revenues if inter-carrier exchange rates have been set (no doubt at the ILEC's insistence) unreasonably high. By taking advantage of overpriced reciprocal compensation, competitive entry simply forces more efficient regulations, just as it does in the access charge context.[12] The proper regulatory response is not to eliminate inter-carrier compensation but to make it cost-based.

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11 See, e.g., Sterling Perrin, "The CLEC Market: Prospects, Problems, and Opportunities," Telecommunications International at 41 (Nov. 1, 1998) (noting ICG's acquisition of ISP Netcom On-Line Communications Services, Inc. and explaining that "ICG's acquisition of an ISP is not unique. Many CLECs have targeted ISPs in the last year. In 1997, ACSI acquired ISP Cybergate, Intermedia paid US$150 million for Internet backbone provider Digex, TCG concluded its US$65million deal for CERFNet, and WinStar purchased GoodNet."); Jason Meyers, "Global Expansion: GST Telecommunications Buys Whole Earth," Telephony (March 23, 1998) (reporting GST's $9 million cash purchase of ISP Whole Earth Networks).

12 See Access Charge Order, ¶ 263 (adopting a market based approach to access charge reform and explaining that "using a market-based approach should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets").

The same analysis applies to ILEC complaints that CLECs share inter-carrier payments with ISPs through discounts or even payments to ISPs. See SBC Comments at 21-22; Bell Atlantic Comments at 3; GTE Comments at 8-9. This kind of behavior can only occur where reciprocal compensation rates are improperly high.

Equally misplaced is the ILECs' complaint that mandatory inter-carrier compensation gives CLECs the incentive to deploy circuit switched networks for carrying data where packet switching would be more efficient. This theory is refuted by the number of data CLECs such as Covad and Northpoint entering the market. It is these data CLECs, not the ILECs, that have aggressively rolled out services such as xDSL. Moreover, the rollout of cable modem services has only intensified the need for non-cable affiliated ISPs to embrace, rather than avoid, high-speed data technologies. There is simply no evidence that ISPs or their service providers hope to cling to outdated circuit-switched technology.

Finally, ILECs' suggestion that any purported revenue shortfall caused by ISP traffic must be reimbursed through the universal service fund is simply a restatement of arguments recently rejected by the Eighth Circuit. The Eighth Circuit recently held that treating ISPs as end users does not create a subsidy that must be funded through Section 254 universal service mechanisms. See Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 541-542 (8th Cir. 1998) The Commission therefore need not consider this issue again at this time.

III. SECTION 252(i) GIVES LECS THE RIGHT TO OPT INTO INTERCONNECTION AGREEMENT PROVISIONS GOVERNING THE EXCHANGE OF ISP-BOUND TRAFFIC.

Ameritech argues that Section 252(i) MFN rights do not permit requesting telecommunications carriers to opt into contract provisions governing reciprocal compensation under Section 251(b)(5) or those governing the exchange of ISP-bound traffic. See Ameritech Comments at 22-25. This is simply wrong. The Commission is free to construe the ambiguous terms of Section 252(i) far more broadly than Ameritech suggests. Moreover, sound policy mandates that the Commission read Section 252(i) broadly to encompass all of the provisions of LEC interconnection agreements, including those addressing Section 251(b)(5) reciprocal compensation and the exchange of ISP-bound traffic.

Section 252(i) grants requesting telecommunications carriers the right to opt into "any interconnection, service or network element" included in an approved interconnection agreement. 47 U.S.C. § 252(i). Ameritech (apparently based on the conclusion that the term is clear on its face) asserts that the term "interconnection" refers solely to Section 251(c)(2) interconnection and therefore cannot include reciprocal compensation. As an initial matter, Ameritech simply assumes, without analysis, that reciprocal compensation, and thus the exchange of ISP-bound traffic, cannot be included in the term "service." But the term "service" is extremely broad and could easily encompass the transport and delivery of ISP-bound traffic on reasonable terms and conditions. For example, the "service" in question could be characterized as the delivery of non-Section 251(b)(5) traffic destined for another LEC's subscriber on reasonable terms and conditions.

But even as to the term "interconnection," Ameritech's argument fails. That term is used in analogous contexts throughout the statute to incorporate all aspects of local interconnection, including but not limited to, all of the services included in Section 251. Section 251, which of course includes the obligation "to establish reciprocal compensation arrangements for the transport and termination of telecommunications" under subsection (b)(5), is entitled "Interconnection." Furthermore, the Commission has construed a request for "access and interconnection" under Section 271(c)(1)(A) to mean a request that, if implemented via an interconnection agreement, will lead to facilities-based competition.[13] Such competition surely requires the exchange of traffic, as is evidenced in the competitive checklist requirement cross-referencing Section 251(b)(5). See 47 U.S.C. § 271(c)(2)(B)(xiii). Indeed, the competitive checklist

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13 See Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma, *Memorandum Opinion and Order*, 12 FCC Rcd 8685, ¶ 54 (1997), aff'd, SBC Communications, Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998).

provision in Section 271 states that "access and interconnection" as required by Section 271 "includes" reciprocal compensation. See 47 U.S.C. § 271(c)(2)(B), (c)(2)(B)(xiii). The term "interconnection" therefore has been construed to mean much more than Section 251(c)(2) interconnection.

Moreover, the Commission may construe an ambiguous statutory provision in any manner that is reasonable. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Here it would be eminently reasonable and consistent with other aspects of the Commission's enforcement of Section 252(i) to construe the term "interconnection" as used in that provision as permitting pick and choose rights to inter-carrier compensation provisions. After all, it is undisputed (even by Ameritech) that a requesting carrier may opt into an entire agreement, including one whose terms govern the exchange of local and ISP-bound traffic, so long as the agreement has been approved under Section 252. However, in light of the Supreme Court's recent decision to uphold the FCC's pick and choose rules, there is no basis for permitting a requesting carrier to opt into provisions governing the exchange of traffic as part of an entire agreement but not on a stand alone basis.

Furthermore, as the Commission has held, Section 252(i) is a primary mechanism for "ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis."[14] Given the critical importance of the exchange of traffic to competition, there is every reason to use Section 252(i) to prevent discrimination in this area. Ameritech's attempt to prevent Section 252(i) from performing this critical role must therefore be rejected.

CONCLUSION

For the reasons described above, the Commission should mandate that the exchange of ISP-bound traffic between LECs be subject to same regulatory rules and interconnection agreement provisions as traffic that is subject to Section 251(b)(5). Even if the FCC does not adopt this approach, the Commission should ensure that the exchange of ISP-bound traffic is part of the Section 251-252 negotiation, arbitration and appeal process.

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14 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, ¶ 1316 (1996).

Finally, there is no need to change the practice of allocating ILEC revenues associated with ISP-bound traffic to the intrastate jurisdiction for separations purposes.

Respectfully submitted,

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ATTORNEYS FOR TIME WARNER
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d/b/a TIME WARNER TELECOM

April 27, 1999

EXHIBIT

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A/ AMERITECH INDIANA FOR THE COMMISSION TO DECLINE TO EXERCISE IN WHOLE OR IN PART ITS JURISDICTION OVER, AND TO UTILIZE ALTERNATIVE REGULATORY PROCEDURES FOR, AMERITECH INDIANA'S PROVISION OF RETAIL AND CARRIER ACCESS SERVICES PURSUANT TO I.C. 8-1-2.6 *ET SEQ*.	)	CAUSE NO. 40849

VERIFIED REQUEST FOR EMERGENCY SUSPENSION OF AMERITECH'S CSO AUTHORITY, REQUEST TO OPEN AN INVESTIGATION INTO AMERITECH'S CSO PRACTICES AND TO ISSUE AN ORDER REQUIRING AMERITECH TO SHOW CAUSE

Intervenor, Time Warner Communications of Indiana, L.P. ("Time Warner Telecom"), moves the Commission to exercise its emergency authority, pursuant to Ind. Code 8-1-2-113, to temporarily suspend Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana's ("Ameritech") existing authority to offer telecommunication services via customer specific offers ("CSOs") and individual customer arrangements ("ICAs") or individual customer basis ("ICBs") (all of which are jointly referred to as CSOs), to open an investigation into the use and practices of Ameritech regarding CSOs pursuant to the Commission's authority under Ind. Code 8-1-2-58 and other relevant state and federal statutes and order Ameritech to show cause as to how its use of CSOs complies with the anti-discrimination and cross-subsidy provisions of the Indiana Code and the Telecommunications Act of 1996 ("TA-96"). In support of those requests, Time Warner Telecom states:

Emergency Request for Relief

1. Time Warner Telecom is an intervenor in this proceeding, and is certified by the Indiana Utility Regulatory Commission ("Commission") as an alternative or competitive local

exchange carrier ("ALEC" or "CLEC") to provide intrastate telecommunications services in Indiana, including competitive local exchange services. Time Warner Telecom is a wholesale customer of Ameritech and competes with Ameritech for retail customers.

2. The Commission, pursuant to Ind. Code 8-1-2-113, may temporarily alter, amend, or suspend any existing rates, services or practices when it considers it necessary to prevent injury to the business or interests of the people or any public utility. This Commission found Section 113 "grants this commission broad discretion to enter an order affecting the rates, practices or services, on a temporary basis. . . . [S]uch an order may be entered **without opportunity for notice and hearing** if the Commission so determines such issuance to be appropriate." *In Re: Conquest Long Distance Corporation and Saverline Corporation*, Cause No. 39433 (12/3/87), 1987 Ind. PUC LEXIS 39, pp. *4-5 (emphasis added). The Commission should use its broad discretion to grant immediate relief based upon the facts set forth below.

3. Ind. Code 8-1-2-113 is designed to prevent injury to the people or to public utilities of this state. *US Operators, Inc.*, Cause No. 38832 (11/8/89), 1989 Ind. PUC LEXIS 407, p. *3. Emergency relief is manifestly important in this case. The people of the State of Indiana as well as public utilities are being threatened by Ameritech's unlawful conduct, and if emergency relief is not immediately granted, both the public and CLECs will suffer irreparable harm.

4. The Commission should use its authority to temporarily suspend Ameritech's CSO authority because Ameritech is abusing its CSO authority in a manner that discriminates against wholesale customers in favor of Ameritech 'winning-back' retail customers that would reestablish Ameritech as the monopoly provider for a substantial part of the CLEC market.

5. Ameritech is using CSOs contrary to its authority and in violation of state and federal non-discrimination principles. Ameritech's abusive and unlawful CSO practices include providing substantial unlawful credits and/or rebates to retail customers, waivers of nonrecurring charges, below-cost prices and volume discounts, all in an effort to win-back customers and stamp-out its competition, without providing wholesale customers with comparable credits

and/or rebates, waivers of nonrecurring charges, discounted pricing or volume discounts. Ameritech's unlawful actions, leveraged by its market share and monopoly power, and its predatory pricing practices are harming the competitive environment for local exchange service and if not halted, could drive competitors out of business. Hence, there is an immediate and substantial threat of injury to Indiana businesses, CLECs and the interests of consumers.

6. Failure to temporarily suspend Ameritech's CSO authority, given the substantial and immediate threat of injury, is contrary to the legislative intent that Indiana develop "an environment in which Indiana consumers have available the widest array of state-of-the-art telephone services at the most economic and reasonable cost possible [which results from] full and fair competition in the delivery of certain telephone services throughout the state..." Ind. Code 8-1-2.6-1(4).

7. The Commission has found that emergency relief was warranted when there was a demonstration of financial harm due to the likely erosion of a telecommunication provider's customer base, its primary asset, and the corresponding harm to the public of the loss of viable competitors. *Conquest Long Distance Corporation and Saverline Corporation,* Cause No. 38433 (12/3/87), 1987 Ind. PUC LEXIS 39, p. *5-6.

8. More egregious circumstances exist - the illegal and discriminatory actions of Ameritech are likely to thwart effective competition, create a barrier to new entrants while eliminating Ameritech's existing competitors resulting in Ameritech recreating its monopoly contrary to Indiana and federal law - and the evidence set forth in this verified request warrant granting immediate emergency relief in this case without notice and without hearing.

9. Due to the Commission's treatment of Ameritech's CSOs as confidential, CLECs have no way of knowing that CSOs filings have been made. CLECs are unable to independently verify Ameritech's CSO pricing or compliance, and if required to do so, CLECs would never be able to question whether Ameritech was properly using its CSO authority. Ameritech's CSO behavior would go unchecked, unchallenged, and unverified. Hence, the Commission should exercise its authority to investigate Ameritech's CSO offerings based upon the concerns raised in

this request. CLECs are seeing the tip of the iceberg in the marketplace information; only the Commission can know the full extent of this danger.

Background of Ameritech's CSO Authority

10. A brief summary of the Commission's CSO orders may be helpful given that Ameritech's CSO authority has been expanded and limited over the last 10 years to respond to the competitive or non-competitive nature of the telecommunications market. In light of Ameritech's recent CSO practices, the Commission should suspend Ameritech's CSO authority and reexamine whether ILECs should have more stringent regulatory requirement during the infancy of competition.

11. The Commission first approved the use of CSOs for all telecommunications providers for limited types of telecommunications services in 1989. *Re Customer-Specific Offerings*, Cause No. 38561 (10/4/89), 1989 Ind. PUC LEXIS 361 ("Initial CSO Order"). CSOs can be used only when a customer has more than 200 lines, or the nature of the service is unique or significantly different from existing tariff filings, or the service is required prior to its general availability, or the service requires special design criteria. 1989 Ind. PUC LEXIS 361, p. *16. Some services that cannot be offered via a CSO include basic exchange services, exchange access services, intraLATA message toll and WATS or tariffed intraLATA private line services. *Id.*

12. Ameritech committed that when developing prices for CSOs, the rates would be separately developed and include, at a minimum, all relevant costs and rate of return on incremental investment. *Initial CSO Order*, p. *4. In deciding to permit CSOs in limited circumstances, the Commission found that it "must be assured that cross-subsidization will not occur as a result of the relaxed regulation of CSOs." *Id.* at p. *8. Accordingly, the Commission established a price floor by requiring that all rates offered via CSOs be at least the long-run incremental cost ("LRIC") plus 10%. *Id.* This ensures that the local ratepayer benefits from CSO contracts by requiring that contracts provide a contribution to the cost of local exchange service. *Id.*

13. Ameritech was granted a limited opportunity to use ICBs for services classified as "other services." Pursuant to a settlement agreement in Opportunity Indiana I ("OI-I"), Ameritech was permitted to employ ICBs for competitive services, such as Centrex, Dedicated Communication Services, Toll, 800 WATS, operator services and directory services, during the time OI-I was in effect. *In Re: Ameritech Indiana's Petition for Alternative Regulatory Procedures*, Cause No. 39705 (6/30/94), 1994 Ind. PUC LEXIS 250 ("OI-I Order"). Ameritech was still required to comply with filing and pricing requirements, including demonstrating that its pricing for such services exceeds the long run service incremental costs ("LRSIC") plus 1%. *Id.* at p. *44.

14. Ameritech's ICB authority was expanded for a limited time, by virtue of the Centrex trial of MCI/Hancock County Rural Telephone. *Petition of Ameritech for Authorization to Apply a Customer Specific Offering Tariff to Provide the Business Exchange Services*, Cause No. 40178 (2/13/97), 1997 Ind. PUC LEXIS 19, ("MCI CSO Order"). As part of the settlement agreement for OI-I, the settling parties agreed that Ameritech would be permitted to use ICBs for pricing multi-line business BLS and multi-line business BLS-related services when such services are competitive by virtue of a CLEC offering those services. *Id.* The Commission ordered Ameritech to price such services under ICBs at LSRIC plus 1% to ensure that all relevant costs, including the appropriate costs of money, are included in the rates. *Id.; Ameritech Tariff, Part 2, Section 7, Sheet No. 3.* This authority expired at the conclusion of the MCI/Hancock County Rural Telephone Centrex trial, and would only be extended if another CLEC was given the authority to offer multi-line business exchange services on a CSO basis. *Id.* Time Warner Telecom is not aware of any CLEC having CSO authority to this type of service, and Ameritech's authority expired at the conclusion of the MCI/Hancock Centrex trial on May 8, 1998. *Ameritech Tariff, Part 2, Section 7, Sheet No. 3.*

15. Ameritech's ICB treatment for "other services" under OI-I was recently brought into parity with the filing requirements imposed on other carriers using CSOs. The Commission ordered Ameritech to comply with the filing requirements set forth in the CSO order in Cause

No. 38561. *In Re Ameritech Indiana's Petition for Alternative Regulatory Treatment*, Cause No. 40849 (12/30/97) ("OI-2 Final Order on Interim Relief").

Ameritech's CSO Practices

16. The Commission and competitors have been concerned about Ameritech's potential ability to use CSOs to destroy its competitors since at least 1994. *In RE The Petition Of Ameritech For Authorization To Expand Its Customer Specific Offerings To Provide Intralata Dedicated Communications Services,* Cause No. 39385 (2/16/94), 1994 Ind. PUC LEXIS 96 ("We note IDA's . . . belief that [Ameritech's] effort here to obtain relaxed regulation with respect to Dedicated Communication Services is directed more to destroying its competitors than it is to either allowing [Ameritech] to compete with competitors on an equal basis or providing tangible benefits to all of [Ameritech's] customers.").

17. Ameritech concedes that it uses CSOs as a means to prevent what it calls "cream-skimming," targeting the use of CSOs only to situations where an identified competitor exists and Ameritech can secure the business with a proposed revenue stream **above incremental** cost. *Cause No. 39385, p *60.*

18. **Ameritech is not offering service above incremental costs, and it is doing more than merely targeting situations where an identified competitor exists. Ameritech is targeting** certain customers **based upon their calling patterns** (large volume in-bound calling), **and offering** those customers **deep discounts, credits and/or rebates and waivers of charges. Ameritech is** offering to **retail customers, but not to wholesale** customers who **purchase** services from Ameritech **and compete with Ameritech for retail** customers, credits and/or rebates and waivers of charges, **including non-recurring charges and fixed mileage charges, below-cost** pricing, and volume **discounts.**

Unlawful Discriminatory Treatment Between Customers

19. Ameritech will likely assert that this Commission lacks jurisdiction over its CSO offerings, because OI-I relieved Ameritech from certain statutory requirements. Ameritech

cannot hide behind the Commission's declination of jurisdiction in OI-I to relieve itself from having to comply with Indiana law.

20. The Commission may proceed to exercise its full jurisdiction over Ameritech to the extent that the Commission deems it appropriate under Ind. Code 8-1-2.6-2(c). Ameritech's pricing practices certainly warrant reconsideration of the appropriateness of any alternative regulatory treatment, and conclusively warrants reconsideration of the appropriateness of Ameritech's CSO authority.

21. Moreover, Ameritech is not relieved of its obligation to charge just and reasonable rates that are non-discriminatory. Ind. Code 8-1-2-4 requires that any charge made by any public utility for any service be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful. Common law also requires that Ameritech's rates and charges be just, reasonable and non-discriminatory, regardless of any order adopted by the IURC. *See Foltz v. City of Indianapolis,* 130 N.E.2d 650 (Ind. 1955); *South Eastern Ind. Natural Gas Co. v. Ingram*, 617 N.E.2d 943 (Ind. Ct. App. 1993).

22. Ameritech violates Indiana law when it gives an unreasonable preference or advantage to any person, or offers credits and/or rebates or free services to customers. Ind. Code 8-1-2-105 and 8-1-2-106.

23. Indiana's statutory and common law requirement - that rates be reasonable, just, non-discriminatory - is consistent with federal requirements imposed on telecommunication carriers like Ameritech. Section 202(a) of the Communications Act of 1934, as amended by TA-96, prohibits carriers from discriminating where providing 'like' services unless doing so is just and reasonable. 47 U. S. C. 202(a). The burden is placed on the carrier whose practices are at issue to demonstrate that the discrimination is not unjust or unreasonable. *Mid-Missouri Substance v. United Telephone Co. of Missouri,* 9 CR 1284, 1291 (C.C.B. 1997), citing *Competition in the Interstate Interexchange Marketplace,* 6 FCC Fcd 5880, 5903 (1991). In doing so, the key consideration is whether the services are different in any material functional respect. *Ad Hoc Telecommunications Users Committee v. FCC,* 680 F.2d 709, 795 (D.C. Cir.

1982). Accordingly, Ameritech bears the burden of demonstrating it has not discriminated unreasonably by showing that the services are different in some material respect.

24. The Commission has recognized that an ILEC's use of CSOs:

> can, and likely will result in customers receiving identical services, but paying different rates, which cannot be justified on the basis that there are differing costs to provide the services. Rather, the different rates for the same services result simply from the negotiation process leading to the rates set forth in the CSO. . . . That is, no matter how you justify it, discriminatory rates, which are prohibited by IC 8-1-2-4.

Cause No., 39385 p. 67.

25. Ameritech's practices violate discrimination prohibitions of Indiana and federal law in the following respects:

(a) By offering to retail customers, but not to wholesale customers who purchase services from Ameritech and compete with Ameritech for retail customers, at least the following:

credits and/or rebates;
waivers of charges, including non-recurring charges and fixed mileage charges;
below-cost pricing; and
volume discounts.

(b) By offering, to customers who have a large volume of in-bound tariff - like Internet service providers ("ISPs"), while not offering the same to other large volume retail customers who have both in-bound and out-bound tariff, at least the following:

credits and/or rebates;
waivers of charges, including non-recurring charges and fixed mileage charges;
below-cost pricing;

month to month services for the same prices by customers required
to execute 36 month or 60 month contracts; and
volume discounts.

(c) By offering, to customers on an ICB while not offering the same to other retail customers who purchase the same service, at least the following:

credits and/or rebates;
waiver of charges, including non-recurring charges and fixed
mileage charges;
below-cost pricing;
month to month services for the same prices by customers required
to execute 36 month or 60 month contracts;
and volume discounts.

26. Ameritech's conduct has unreasonably discriminated between customers receiving ICB pricing and customers paying tariffed rates.

27. Ameritech has also unreasonably discriminated against customers who have a one-way calling pattern, like ISPs, and customers with two-way calling patterns. These customers purchase the same types of services and there is no cost basis to distinguish these types of customers - except the anticipation of receiving reciprocal compensation for local calls terminating to ISPs.

28. Ameritech's refuses to waive non-recurring charges to its wholesale customers, under any condition, and requires very large non-recurring charges, which Ameritech claims to be required to cover its costs plus a contribution to its joint and common costs. Ameritech's conduct discriminates against wholesale customers, who are Ameritech's competitors, because Ameritech is offering rates to end-users well below the rates it charges its wholesale customers for the same services, effectively pricing its competitors out of the market.

CSOs being used Illegally in Other Respects

29. Even in instances when Ameritech may be lawfully using its CSO authority, it is abusing that authority by pricing in a manner that ensures that Ameritech remains the monopoly provider of services to the business community.

30. Although Ameritech has not reflected in its tariffs that it has filed any CSOs since January of 1998 (*Ameritech Catalog, Part 2, Section 7, Sheet No. 23*), existing customers of Time Warner Telecom have been offered ICB pricing by Ameritech in a effort to "win-back" customers that Ameritech lost years ago to Time Warner Telecom. Ameritech is offering to retroactively credit or rebate costs customers have paid to CLECs retroactive to the date Ameritech lost the business, waiving charges, and quoting prices that are substantially below the prices that Ameritech offers to wholesale customers.

Unlawful Credits and/or Rebates

31. Upon information and belief, as an incentive to "win-back" customers, Ameritech is offering to pay customers a credit or rebate to return to Ameritech. As explained to Time Warner Telecom, the amount of the credit or rebate is the price differential between what the customer has paid for service from the CLEC and the current price Ameritech is offering.

32. For example, if a customer had purchased 28 ISDN Primes at the price of $1000.00 each per month for twelve months, and Ameritech is offering that customer 28 ISDN Primes for $275.00 each, Ameritech would credit or rebate the customer nearly $250,000 to switch from the CLEC back to Ameritech. That is, Ameritech would credit that customer $725.00 ($1000 less $275) for each of the 28 ISDN Primes for the 12 month period. In essence, Ameritech's retroactive credit could potentially pay for over three years of service -- 3 years of free service paid for by Ameritech. **Free service** is unarguably priced below cost.

33. Ameritech's rebating or crediting practices are not permitted under Indiana law, Ameritech's tariffs or any order of the Commission. Similar types of Ameritech's rebating practices or providing free service as part of its "win-back" strategy has been found anticompetitive and unlawful by other states. *See In the Matter of the Complaint of the Ohio*

Cable Telecommunications Association v. Ameritech Ohio, PUCO Case No. 97-654-TP-CSS (Opinion and Order, 7/17/97) (finding that Ameritech's cable affiliate's issuance of credits and/or rebates in the form of "AmeriChecks" was an undue preference in violation of Ohio law). *See also The Michigan Cable Telecommunications Association. vs. Ameritech Michigan,* Case No. U-11412 (Opinion and Order, 12/19/97) (ordering Ameritech to cease and desist accepting AmeriChecks issued to customers by its affiliate cable provider finding the rebating practice to violate the requirement that rates meet or exceed TSLRIC).

Waiving Charges

34. Upon information and belief, Ameritech is offering to waive nonrecurring charges and installation charges for its ISDN Prime services. Under its resale tariff on file with the Commission, which should roughly reflect Ameritech's costs to provide this type of service, Ameriteoh charges its wholesale customers a non-recurring charge of $1,500.00. *Ameritech Catalog, Part 23, Section 17, Sheet No. 16.* Retail customers are charged $2,000.00 in nonrecurring charges for ISDN Prime services. *Ameritech Catalog, Part 17, Section 2, Sheet No. 9.*

35. Ameritech cannot justify waiving the substantial cost of non-recurring charges by claiming the offer falls under any promotion; it was running a promotion in which it would waive the non-recurring charge for ISDN services, but specifically stated that the promotion is NOT available for customers who take the service under an ICB arrangement. *Ameritech Catalog, Part 2, Section 8, Sheet No. 3.* Yet, under ICB arrangements, Ameritech is offering to waive this cost-based component that it charges to other wholesale and retail customers.

36. Ameritech also waives fixed mileage charges and gives volume discounts for customers and Ameriteoh agents who purchase T1s from Ameritech, but Ameritech refuses to provide the same benefits to its wholesale customers.

37. Ameritech's waiver of non-recurring charges and installation charges, waiver of fixed mileage charges and volume discounts is in violation of its tariffs, results in a below-cost

price to ICB customers, and discriminates against wholesale customers and retail customers who are required to pay those prices.

Below-Cost Pricing

38. Upon information and belief, Ameritech is quoting potential customers - especially customers with a large volume of in-bound calls – and Ameritech agents a price of $275 to $375 for ISDN Prime Service, a rate which is well-below Ameritech's own costs to provide such service.

39. Ameritech's wholesale tariff sets forth a monthly rate of $410.80 for ISDN Prime service, plus $517.45 a month for basic exchange service with its ISDN Prime service, plus transportation charges. *Ameritech Catalog, Part 23, Section 17, Sheet No. 16.* Ameritech charges its retail customers a monthly rate of $520.00, plus $655.00 a month for basic exchange service with its ISDN Prime service, plus any transportation charges. *Ameritech Catalog, Part 17, Section 2, Sheet No. 9.*

40. Time Warner Telecom has no way of knowing Ameritech's cost for such services under LSRIC +1% (cost studies are treated as confidential), but Ameritech's wholesale tariffs provide a surrogate for comparison purposes. Ameritech's costs (based on its wholesale rate) are $410.80 a month for basic exchange access plus $517.45 a month for ISDN Prime - for a total cost of $928.25, without transport charges; yet, Ameritech is offering customers an ICB rate of $275.00 for the complete package which may or may include transportation. Ameritech's ICB offering is over $650.00 below its costs and designed to price its competitors out of the market.

41. Ameritech is also offering deep discounts to customers and Ameritech agents who have large volumes of in-bound calls who purchase T1s from Ameritech. Ameritech has quoted a volume discount on T1s at $35.00 a piece.

42. When the deep discount on ISDN Prime are included with the costs paid for retroactive rebate and/or credit and the foregone costs associated with the waivers of charges, any assertion by Ameritech that its ICB pricing exceeds LRSIC +1% is clearly wrong. Ameritech is not only providing credits that could result in free service, it is effectively paying customers to

come back to Ameritech. This type of pricing should raise a red-flag, and warrant future investigation by the Commission.

Violation of Existing Authority

43. Not only do Ameritech's CSO offerings appear, on their face, to be unjustly discriminatory both with respect to its retail customers and its wholesale customers, customers are reporting ICB offerings for nearly every type of service, even those services for which Ameritech might not have authority to offer CSOs. Ameritech's pricing under CSOs does not appear, on its face, to be consistent with the requirement that CSO pricing reflect all costs to provide the service, and be priced in excess of LRSIC + 1%. Ameritech is offerings CSOs for multi-line business exchange services, although its existing authority has expired. Ameritech's offerings are clearly in violation of its tariffs and the Commission's order.

44. Ameritech is offering CSOs for multi-line business exchange services, although its existing authority has expired. Ameritech's offerings are clearly in violation of its tariffs and the Commission's order. This violation alone should justify emergency suspension of its CSO authority.

Investigation of Ameritech's CSO Authority under OI-I and OI-2

45. The Commission also recognized that to give Ameritech CSO authority before competitors are established could create a situation where other providers of services may not be able to compete with Ameritech. If that situation were to materialize, the Commission found that "we would be back to the situation where [Ameritech] would monopolize the . . . market, and customers . . . would not have the choices available to them which we have found to be in the public interest." *Cause No. 39385, p. *71.*

46. The Commission described its role in fostering competition:

> While we are not required. . . to take steps which will ensure that [Ameritech's] competitors . . . will be successful in their business operations, we believe that we should not, on the other hand, take steps which might prevent the . . . market from being a truly 'competitive environment.' To do so would not further the public interest. It would simply preclude development of competition. . ."

*Cause No. 39385, pp. *71-72.* To permit Ameritech to continue to offer CSO pricing without safeguards and review would effectively sanction the sort of unjust and unreasonable discrimination in charges and practices that the Commission and the law were designed to prevent.

47. The Commission acknowledged that certification of competing carriers does not mean the Commission's job is done. It said that, "While it is our goal to supplant much of our regulatory oversight with the regulation of a competitive marketplace . . . that day has not fully dawned." *Cause No. 40849I, 12/30/97 Final Order on Interim Relief, p. 3.*

48. This docket is the appropriate forum to review Ameritech's CSO authority. Ameritech has a pending request for expanded CSO authority in this docket, warranting investigation of the appropriateness and effectiveness of its current authority, as well as the need for expanded authority. In its January 29, 1999 submission of its plan, Ameritech explains that under its proposed plan, it would have the authority to use CSOs for any service included as a Category 3 Service. (Alt. Reg. Plan, p. 10). Ameritech's definition of a Category 3 Service includes all new services, promotions and packages, including packages of services that include non-competitive services. (Alt. Reg. Plan, p. 9). Hence, Ameritech's proposed Alt. Reg. Plan would drastically expand its ability to use CSOs.

49. The Commission found that Ameritech has the burden to demonstrate that its CSO authority is justified under the standards set forth in Ind. Code 8-1-2.6-1 *et seq.* (the "Alt. Reg. Statute"). *Cause No. 39385 at p. *80.* An investigation as part of this docket would permit the Commission to examine whether Ameritech can demonstrate (1) that the public interest requires the Commission to decline to exercise its jurisdiction, (2) that Ameritech's provision of services under CSOs would be in the public interest and (3) that its existing and expanded CSO authority promotes at least one of the five elements set forth in the Alt. Reg. Statute. *See Cause No. 39385* (applying the Alt. Reg. Statute to the declination of jurisdiction necessary for CSO authority).

50. Hence, this docket is the appropriate docket in which to consider Ameritech's existing and requested CSO authority.

Impact of Ameritech's Unlawful Practices on the Competitive Environment

51. There is no doubt that Ameritech still has monopoloy power over the local telecommunications market. *IURC Telephone Report to the Regulatory Flexibility Committee,* 7/1/98, p. 5 ("the data indicate that local competition in Indiana is virtually non-existent."). Monopoly power is often inferred from a dominant market share, especially where there are significant barriers to entry in the market for new competitors. See Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1232 (8th Cir. 1987), cert. denied, 108 S. Ct. 751 (1988); Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1335 (7th Cir. 1986).

52. Ameritech's practices, if unchecked, will result in Ameritech's actual monopolization of the market, by exclusionary and anticompetitive means, in which it will exercise its ability to control prices and exclude competition, in violation of state and federal law.

53. There is little doubt that Ameritech's practices will lead to less competition in Ameritech's monopoly markets, which is the classic definition of a predatory practice.

54. There is a great deal of concern that Ameritech's pricing practices result in price discrimination. Franklin M. Fisher, an economist and professor at the Massachusetts Institute of Technology, testified in the Microsoft antitrust case and defined "price discrimination," as charging higher prices to some manufacturers and lower prices to others. *New York Law Journal,* January 12, 1999, K. DONOVAN. Ameritech is engaging in the same type of price discrimination, charging lower rates to its retail customers than it does to its wholesale customers. Thereby, it secures its market share by ensuring that wholesale customers, who pay higher rates than even the retail customers, have to charge less than the actual cost they paid for the service to compete with Ameritech. Start-up companies cannot sustain the continued losses they will suffer from these practices for long, and will undoubtedly fold to Ameritech's price squeeze.

55. It is evident that Ameritech's treatment of its wholesale customers is not in parity with its treatment of retail customers it hopes to win-back from its competitors. Having your competitor also be your supplier, as Ameritech is for most CLECs, is the source of tension and difficulty in fostering competition in the local market, including the type of illegal price squeezes that are occurring due to Ameritech's CSO pricing practices. AT&T recommended to the both the Illinois and Ohio Commissions a solution to this problem: separate Ameritech's retail and wholesale operations. *See SBC/Ameritech Merger Cases, ICC Docket No. 98-0555 and PUCO Case No. 98-1024-TP-UNC.* The Commission may find that it should advocate, to the FCC, *inter alia*, corporate structural separation as a condition of approval of the SBC/Ameritech merger.

56. Ameritech's practices cannot be justified as competition on the merits or as restraints reasonably 'necessary' to competition on the merits. It is apparent, rather, that Ameritech's conduct is capable of making a significant contribution to creating or maintaining Ameritech's monopoly power in violation of state and federal law.

57. Ameritech is targeting certain customers based upon their calling patterns (large volume in-bound calling), and offering those customers deep discounts and credits and/or rebates. If Ameritech is successful in winning-back these customers, it will avoid having to pay reciprocal compensation for this traffic to a CLEC. Ameritech has refused to pay reciprocal compensation to CLECs for this traffic - threatening CLECs' revenues, and now Ameritech is selectively targeting this group of customers based upon their calling patterns – additionally threatening a stream of revenue for CLECs. The only way for CLECs to retain this group of customers is to lower prices below costs, which start-up businesses cannot afford to do but monopolies who reap excessive rates of return can. By doing so, Ameritech attacks the financial viability of CLECs.

58. The Commission has established guidelines to help it analyze whether a market is competitive, for purposes of determining if alternative regulation is appropriate. The Commission included the following:

First, no single firm should dominate the market.
Second, there must be a large number of firms in the market. A large number of firms will inhibit collusive activity.
Third, there are no artificial barriers to exit or entry. The lack of barriers will allow firms to enter markets exhibiting high profits and leave low profit markets. Therefore, profit will retain its role as an incentive to produce what consumers demand. The fear of losing sales to entrants forces existing firms to minimize cost and maximize product quality.
Fourth, there should be no unfair, exclusionary, predatory, or coercive tactics. Such tactics can be used by dominant firms to eliminate smaller existing firms and discourage entrants.
Sixth, profits should be at levels just sufficient to reward investment, efficiency and innovation.

In RE: Reopened Investigation to Determine the Extent of Regulation to COPT, Cause No. 38158 (11/9/95), 1995 Ind. PUC LEXIS 400, pp. *19-22.

59. Reviewing these guidelines with Ameritech's CSO practices in mind, it is apparent that deregulating Ameritech's pricing authority too soon will cause irreparable harm to the market. Ameritech is still dominating the market, and its pricing practices will ensure that its domination of the market continues. The market has not developed to the extent that there are a large number of firms and there are still barriers to entry. Ameritech is employing unfair, exclusionary, predatory and coercive tactics that will eliminate smaller providers and discourage new entrants. It is too early in the game to give Ameritech broad CSO authority.

60. The FCC agrees that ILECs would likely engage in strategic pricing behavior if prematurely granted the freedom to offer customer-specific rates, and recently denied CSO authority to an ILEC. *Southwestern Bell Telephone Co., Tariff FCC No. 73*, CC Docket No. 97-158, Transmittal No. 2633, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311 (1997). The FCC explained that an ILECs strategic pricing would protect its monopoly position in all its markets by aggressively pricing and offering reductions

which would dissuade potential entrants from competing in markets where initial entry occurs. *Id.* at ¶49-50.

61. According to the FCC, unfettered strategic pricing of an ILEC has a profound impact on new entrants because:

> [a] new entrant's decision to enter is . . . based on its expectation that it will be able to recover, within a reasonable time frame, its cost of [large up-front investments required for entry], along with the on-going costs of providing . . . services, plus a reasonable return on investment. [The ILEC] . . . has already made such an investment and has a customer base that allows it to benefit from significant economies of scale. Therefore, it may well be in [the ILEC's] long-term interest to deprive entrants of the opportunity to achieve significant economies by locking in large customers using customer-specific, long-term contracts before a competitor enters on a facilities basis. [The ILEC] may find it advantageous to offer lower prices to even a few relatively large . . . customers even when such reductions might not, in the short term, contribute as much to profits as would a generally available tariffed rate.

Id. at. ¶49.

62. The FCC also recognized that an ILECs CSO pricing behavior has a deterrent effect on potential new entrants.

> If the incumbent is able to develop a reputation of aggressively competing via targeted bids with recent entrants by doing so in a handful of markets, it may be able to dissuade potential entrants from entering any of its other markets. Thus, the incumbent may protect its monopoly position in all its markets by aggressively competing in markets where entry initially occurs.

Id. at ¶50.

63. The FCC's analysis is compelling. To allow Ameritech to engage in CSO pricing at this stage of the development of competition is to run the risk that those more efficient firms of the future will never become established.

64. Ameritech's pricing practices could benefit one type of customer, who might experience lower prices in the short run (at the expense of other customers, potential cross-

subsidization and the advent of competition), but a broader range of customers is likely to receive much more substantial efficiency gains if competition is allowed to develop. Hence, if Ameritech's practices continue unchecked, they will substantially lessen competition, tend to create a monopoly or injure, destroy or prevent competition with the Ameritech, in violation of federal and state laws.

Order to Show Cause and Review of Procedures

65. Ameritech acknowledges that the Commission has jurisdiction to investigate, at any time, the reasonableness of any ICB arrangement, and acknowledges that it has an obligation to provide with the Commission with any and all information required by the Commission, subject only to Ameritech's right to request proprietary treatment of such information. *Cause No. 40178; Ameritech's Tariff, Part No. 2, Section 7, Sheet No. 3.*

66. The Commission has authority to initiate an investigation and request files, documents and records pursuant to Ind. Code 81-1-2-58 and 8-1-2-52.

67. Accordingly, based upon Ameritech's CSO practices, below-cost pricing, and discriminatory treatment of its customers, the Commission should initiate an investigation and require Ameritech to come forward with evidence to show cause as to how its CSO practices comply with Indiana law, federal law, and the Commission's orders.

68. Ameritech should be required to prove that any discrimination or pricing offered pursuant to a CSO is not unjust or unreasonable discrimination; rather, Ameritech should be required to show that the discrimination is reasonable based upon the different costs to provide service to the customer, the services in question are different in some material respect or the special needs of the customer.

69. The Commission, as part of its investigation, should also review its internal processing of CSO filings. While the Commission requires Ameritech's CSOs to be submitted to the Telecommunications Department for review of costing information, the Commission lacks

procedures and resources to ensure that Ameritech's pricing is not below its costs, or not discriminating between customers.

70. The Telecommunications Division, in the limited time allowed for review, cannot compare the rates to rates that may be charged by other providers in the market. Moreover, competitors who could provide the Commission with valuable information on pricing and costs have no way of knowing that the Commission might need market information for comparison because CSO filings are treated as confidential. Competitors are not even aware that a CSO has been filed; the Telecommunication Division does not prepare minutes or summaries of recent filings that would even identify the types of services for which CSOs are offered. The Commission should reevaluate its processing of ILEC CSOs, including the summary handling of costing information and the types of information needing proprietary protection.

WHEREFORE, Time Warner Telecom requests that the Commission do the following:

1. Temporarily suspend Ameritech's authority to use ICBs and CSOs;
2. Open an investigation, creating a subdocket in this cause, to investigate the appropriateness, pursuant to Ind. Code 8-1-2.6-1 *et seq.*, of Ameritech's existing CSO/ICB authority and its request for expanded CSO/ICB authority;
3. Order Ameritech, pursuant to the investigation, to provide the Commission with evidence to show cause as to how its CSO/ICB practices comply with Indiana law and the Commission's orders;
4. Review, as part of its investigation, the Commission's processes for reviewing ICBs/CSOs and implement procedures, including creating minutes of the Telecommunication Division, for ICB and CSO filings;
5. Order any other appropriate relief, including assessing sanctions and/or costs against Ameritech for its anticompetitive and discriminatory actions.

Respectfully submitted,

Time Warner Telecom
OF INDIANA, L.P.

By: ______________________
Pamela H. Sherwood

AND

Marsha Schermer
Time Warner Telecom
Vice President-Regulatory
Midwest Region

VERIFICATION

I, Mark A. Titus, hereby affirm, under the penalties for perjury that I have read the foregoing document and know the contents thereof, that I have signed the Verified Request on behalf of Time Warner Telecom and have the authority to do so, and the foregoing representations are true to the best of my knowledge and belief.

Mark A. Titus
Vice President, Midwest Region
Time Warner Telecom